ABB Transmission and Distributions Sdn Bhd v Sri Antan Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — SUIT NO D3–22–1635 OF 2000
ZULKEFLI J
24 NOVEMBER 2008

Contract — Building contract — Subcontract — Outstanding payments — Whether first defendant breached subcontract by diverting and pocketing assigned payments from second defendant — Whether first defendant breached subcontract when it delayed and disrupted plaintiff's performance of subcontract causing latter to suffer various losses and expenses

Contract — Building contract — Subcontract — Variation — Fundamental changes to subcontract — Cancellation and relocation of substations — Whether an act of varying subcontract — Whether first defendant accorded unilateral right to vary subcontract — Whether variation had to be by mutual consent — Whether by reason of first defendant's repudiation plaintiff was discharged from further performance of subcontract — Whether there was any basis for first defendant to hold on to retention monies

The first defendant was awarded a contract for the design, manufacture, testing of supply and erection of 275KV, 132KV, 33KV and 11KV switchgears, ancillaries and civil works for TNB Transmission System Development, Phase 1 Mainheads D and F. The Mainhead D had seven substations and so did Mainhead F. The first defendant engaged the plaintiff to design and supply the transmission equipments for the above contract. The plaintiff herein contented that the first defendant had repudiated the subcontract when they had not only failed to pay the plaintiff's outstanding invoices but had in fact diverted monies from the above contract which were supposed to be assigned to the plaintiff as payment of the plaintiff's invoices to the first defendant. The plaintiff further alleged that the first defendant had repudiated the subcontract and was in breach of the following acts; (a) cancellation of the five substations; (b) relocations of substations and (c) unilateral takeover of substations, among others. These breaches of contract had resulted in losses suffered by the plaintiff. The plaintiff filed an action against the first defendant for a declaration that the latter had by its conduct repudiated the subcontract entered into between them. By the said repudiation, the plaintiff claimed, inter alia, an order that they were no longer

bound by that subcontract and further, to recover an outstanding sum of RM314,482.94 together with the accrued interest on the said amount.

Held, allowing the plaintiff's claim and dismissing the first defendant's counterclaim with costs:

(1) The first defendant had breached the subcontract by diverting and pocketing the assigned payments from second defendant. The first defendant's deliberate act of diverting the money was without doubt an act that had repudiated the subcontract which entitled the plaintiff to consider itself no longer bound by the subcontract (see para 47).

(2) In the performance of the subcontract the first defendant was under a duty to cooperate and under a duty of non-prevention. These duties required the first defendant to cooperate with the plaintiff to enable the plaintiff to carry out its work in a regular and orderly manner and for the first defendant not to impede the plaintiff from carrying out its obligations in a regular and orderly manner. The first defendant had breached the subcontract when it delayed and disrupted materially the plaintiff's performance of the subcontract causing the plaintiff to suffer various losses and expenses (see paras 49–50).

(3) The first defendant had no right to cancel the five substations. Nothing in the subcontract permitted it. Cancelling the substations was basically an act of varying the subcontract when no such right existed under the subcontract. Without an express right in the subcontract to order variation, the first defendant was not entitled to unilaterally order the cancellation. Any changes to the subcontract could not be decided by the first defendant alone but should have been mutually agreed to by the parties. Therefore, the first defendant was required to obtain the consent of the plaintiff to effect the cancellation of the five substations, which was a fundamental change to the subcontract. Hence, the first defendant's act of cancelling the five substations was a clear breach of the subcontract (see para 91).

(4) The serious action of the first defendant's act of diverting a very substantial amount of the plaintiff's money, cancellation of the substations, refusing to pay the plaintiff for equipment delivered, the late payments, taking over the substations without good reason through their notice of taking over and expecting the plaintiff to continue with the reduced scope of the contract at the original contract rates, all point to the conclusion that the first defendant did not intend to honour its obligations in the subcontract. With these actions, the first defendant

had destroyed all trust and confidence that the plaintiff had in it. These actions also made it very difficult for the plaintiff to continue with the subcontract (see para 124).

[Bahasa Malaysia summary

Defendan pertama telah diawardkan kontrak untuk mereka bentuk, pembuatan, menguji bekalan dan mendirikan 275KV, 132KV, 33KV dan 11KV alatan suis, kerja-kerja sampingan dan kerja-kerja sivil untuk Pembangunan Sistem Transmisi TNB, Fasa 1, Mainhead D dan F. Mainhead D mempunyai tujuh pencawang dan begitu juga Mainhead F. Defendan pertama mengambil plaintif untuk mereka bentuk dan membekal peralatan transmisi bagi kontrak di atas. Plaintif di sini menegaskan bahawa defendan pertama telah mengingkari subkontrak apabila mereka tidak hanya gagal membayar plaintif invois tertunggak tetapi sebenarnya telah mengalihkan wang daripada kontrak di atas yang sepatutnya diberikan kepada plaintif sebagai bayaran invois plaintif kepada defendan pertama. Selanjutnya plaintif mendakwa bahawa defendan pertama telah mengingkari subkontrak dan memungkiri tindakan berikut, antara lain; (a) membatalkan lima pencawang; (b) penempatan semula pencawang dan (c) mengambil alih secara sepihak pencawang-pencawang. Kemungkiran kontrak ini telah menyebabkan plaintif menanggung kerugian. Plaintif telah memfailkan tindakan terhadap defendan pertama untuk satu deklarasi bahawa akhirnya melalui tindakannya sendiri memungkiri subkontrak yang dimasuki di antara mereka. Berdasarkan kemungkiran tersebut, plaintif menuntut, antara lain, perintah bahawa mereka tidak lagi terikat dengan subkontrak dan selanjutnya, mendapatkan kembali jumlah tertunggak sejumlah RM314,482.94 bersama-sama dengan faedah yang terakru atas jumlah tersebut.

Diputuskan, membenarkan tuntutan plaintif dan menolak tuntutan balas defendan pertama dengan kos:

(1) Defendan pertama telah memungkiri subkontrak dengan mengalihkan dan menggelapkan bayaran yang diberikan daripada defendan kedua. Tindakan defendan pertama yang sengaja mengalihkan wang tersebut adalah tanpa ragu-ragu satu tindakan yang telah mengingkari subkontrak tersebut yang memberikan hak kepada plaintif untuk mempertimbangkan yang iaya tidak lagi terikat dengan subkontrak tersebut (lihat perenggan 47).

(2) Dalam perlaksanaan subkontrak, defendan pertama adalah bertanggungjawab untuk bekerjasama dan tidak menghalang. Tanggungjawab ini memerlukan defendan pertama untuk bekerjasama dengan plaintif bagi membolehkan plaintif melaksanakan

tugas-tugasnya secara biasa dan tersusun dan bagi defendan pertama untuk tidak menghalang plaintif daripada menjalankan tanggungjawabnya secara kebiasaan dan tersusun. Defendan pertama telah memungkiri subkontrak apabila secara material melewatkan dan mengganggu pelaksanaan subkontrak oleh plaintif yang menyebabkan plaintif menanggung pelbagai kerugian dan perbelanjaan (lihat perenggan 49–50).

(3) Defendan pertama tidak berhak untuk membatalkan lima pencawang tersebut. Tiada di dalam subkontrak membenarkannya. Pembatalan pencawang secara dasarnya adalah tindakan mengubah subkontrak apabila tiada hak yang wujud di bawah subkontrak. Tanpa hak yang jelas di dalam subkontrak yang mengarahkan pengubahan defendan pertama tidak berhak untuk membatalkannya secara sepihak sahaja. Mana-mana perubahan kepada subkontrak tidak boleh diputuskan oleh defendan pertama sahaja tetapi seharusnya dipersetujui secara bersama oleh pihak-pihak. Oleh itu, defendan pertama perlu untuk mendapatkan kebenaran daripada plaintif untuk melaksanakan pembatalan lima pencawang tersebut, yang mana adalah perubahan utama kepada subkontrak. Oleh itu tindakan defendan pertama yang membatalkan lima pencawang tersebut adalah jelas pelanggaran subkontrak (lihat perenggan 91).

(4) Tindakan yang serius daripada tindakan defendan pertama adalah mengalihkan sejumlah besar wang plaintif, pembatalan pencawang, enggan membayar plaintif bagi peralatan yang dihantar, pembayaran lewat, mengambil alih pencawang tanpa sebab yang baik melalui notis pengambil alihan mereka dan mengharapkan plaintif meneruskannya dengan mengurangkan skop kontrak pada kadar kontrak asal, kesemuanya disimpulkan bahawa, defendan pertama tidak bermaksud hendak memenuhi tanggungjawabnya di dalam subkontrak. Dengan tindakan-tindakan ini, defendan pertama telah memusnahkan semua kepercayaan dan keyakinan plaintif terhadapnya. Tindakan ini juga menyukarkan plaintif untuk meneruskan dengan subkontrak (lihat perenggan 124).]

Notes

For cases on subcontract, see 3(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 2912–2921.

Cases referred to

Ban Chuan Trading Co Sdn Bhd v Ng Bak Chuan [2004] 1 MLJ 411, CA (refd)

Ban Hong Joo Mines Ltd v Chen & Yap Ltd [1969] 2 MLJ 83, FC (refd)

Barque Quilpu Ltd v Brown [1904] 2 KB 264, CA (refd)

Bonham-Carter v Hyde Park Hotel (1948) 64 TLR 177 (refd)

Chadmax Plastics v Hansen and Yuncken [1986] 1 BCL 52 (refd)
Dodd v Churton [1897] 1 QB 562 (refd)
Lee Kam Chun v Syarikat Kukuh Maju Sdn Bhd (Syarikat Perumahan Pegawai Kerajaan Sdn Bhd Garnishee) [1988] 1 MLJ 444, HC (refd)
Luxor (Eastbourne) Ltd v Cooper [1941] AC 108, HL (refd)
Sahu Ram Kumar v Muhammad Yakub & Anor AIR 1924 PC 123 (refd)
Sim Chio Huat v Wong Ted Fui [1983] 1 MLJ 151; [1983] 1 CLJ 178, FC (refd)
Yong Mok Hin v United Malay States Sugar Industries Ltd [1967] 2 MLJ 9, FC (refd)

Legislation referred to
Civil Law Act 1956 s 11
Contracts Act 1950 s 40

Krishna (Edmund Poniah & Hema Markandan with him) (Liza Chan & Co) for the plaintiff.
Lee Chan Leong (LC Chua with him) (Chan Leong & Co) for the defendants.

Zulkefli J (now FCJ):

THE PLAINTIFF'S CLAIM

[1] The plaintiff filed an action against the first defendant claiming the following reliefs:

(1) a declaration that the first defendant had by its conduct repudiated the subcontract entered into between the plaintiff and the first defendant. By the said repudiation of the first defendant, the plaintiff claimed it is no longer bound by that subcontract;

(2) an outstanding payment of USD2,170,544.99 and RM1,665,411.98; accrued interest on the said amounts at the rate of 1.5% per month from the due date of each invoice as listed in para 13 of the amended statement of claim until date of full and final realisation; and accrued interest at the rate of 1.5% per month on all invoices that have been settled by the first defendant outside the 60 days period commencing from the due date of each respective invoice as stated at para 13 of the amended atatement of claim until the date of actual settlement by the first defendant;

(3) a retention sum of RM405,826.30 and USD952,917.95 (or RM3,621,088.21 @ RM3.80 to USD1) and interest thereon according to s 11 of the Civil Law Act 1956 ('CLA');

(4) loss and damages to be assessed for matters arising from paras 12.1, 12.3 and 12.4; para 12.2; para 12.5 of the amended statement of claim and interest on the assessed amount in accordance with s 11 of the CLA; and

(5) costs.

[2] Since the filing of the action, the plaintiff stated that the outstanding payment owing by the first defendant has reduced. As at the time of trial, after accounting for the first defendant's part payments made in pursuant to a consent order dated 2 April 2001 entered in this action, the plaintiff's claim for outstanding payment has been reduced to RM313,482.94.

[3] At the commencement of the trial the plaintiff indicated that it is not proceeding with the action against Tenaga Nasional Berhad ('TNB'), the second defendant.

THE PLAINTIFF'S CASE

[4] The plaintiff is a company that supplies and erects substations, switchgears and transmission equipment. The first defendant is a company carrying out business in the field of electrical engineering wherein it carries out works and contracts for governmental bodies such as TNB, the second defendant.

[5] In 1996, the first defendant requested the plaintiff to quote for the supply and erection of 275KV, 132KV, 33KV and 11KV transmission equipments for TNB Transmission System Development 1996 Phase 1 Mainheads D & F, a job that the first defendant was tendering for. Mainhead D has seven substations and so does Mainhead F.

[6] The plaintiff submitted its quotation dated 11 June 1996. This quotation was later revised by a letter dated 12 June 1996 and by a letter dated 14 June 1996. These letters set out the terms and conditions for the plaintiff's quotation.

[7] The first defendant was successful in its bid for the TNB contract. Under a letter of acceptance dated 25 August 1997, the first defendant was awarded contract No TNB 632/97. This was a contract for the design, manufacture, testing of supply and erection of 275KV, 132KV, 33KV and 11KV switchgears, ancillaries and civil works for TNB Transmission System Development 1996 for Mainheads D and F. The contract price was RM141,321,196 as stated in cl 5 of the contract.

[8] The first defendant was required to complete the contract within 15 months from the acknowledgement of the letter of acceptance as required by cl 10 of the contract.

[9] On 8 October 1997, the first defendant engaged the plaintiff to design and supply 275KV, 132KV, 33KV and 11KV transmission equipments for the TNB's Contract No 632/97 ('subcontract').

[10] The first defendant issued two purchase orders to the plaintiff. They were purchase order No 241/97 for the sum of RM43,392,069.94 for seven substations under Mainhead D. The purchase order is in bundle ABD1 at p 43 and purchase order No 241 A/97 for the sum of RM28,624,902.59 for another seven substations under Mainhead F, which is in bundle ABD1 at p 44. In total, there were 14 substations.

[11] The purchase orders were issued based on the plaintiff's quotation dated 14 June 1996. The documents forming the subcontract between the plaintiff and the first defendant are:

(i) the first defendant's purchase order No 241/97 and 241 A/97; and

(ii) the plaintiff's quotation letters dated 11 June 1996, 12 June 1996 and 14 June 1966 which includes the plaintiff's 'general condition for the supply of plant and machinery for import and export UN No 188 March 1957 with ABB addendum'.

[12] In each purchase order, there is a column for FOB (for the imported portion) and the other for the local portion. For the FOB portion payment in US Dollar. The FOB portion was for USD15,611,525.48.

[13] The salient terms of the subcontract entered into by the parties are as follows:

(a) payment — the first defendant was required to pay the plaintiff by assigning payments due from TNB to plaintiff. This was to be carried out by a deed of assignment to the plaintiff of all monies due from TNB for both the portions as stipulated in bundle ABD1 at p 13, the plaintiff's revised offer in letter dated 14 June 1996. TNB gave consent to the assignment;

(b) the plaintiff's 'general condition for the supply of plant and machinery for import and export UN No 188 March 1957 with ABB addendum' shall apply. ABB's addendum provides amongst others as in cl 8.5 of the subcontract that if payment is not received, the plaintiff is entitled to postpone the fulfillment of its obligation if there is delay in the payments by the purchaser (which is the first defendant). It also

A provides that the plaintiff is entitled to impose interest at 1.5% per month for any outstanding invoice issued;

(c) with regard to delivery, the contract period is fifteen months from receipt of commercial clear order and the terms of delivery:

B (i) technical details as supplied by the purchaser. Approval of layout and section drawings;

(ii) approval of equipment drawings and technical calculations within two weeks from submission;

C (iii) exemption permits for custom and import duties; and

(iv) all civil works not within the plaintiff's responsibility should be done in a reasonable period of time.

D **[14]** And if the above conditions were not met and there is a delay, total delivery time would increase and cost would also increase for which the plaintiff will seek compensation.

E **[15]** The plaintiff contended that it had to undertake and had undertaken the following various stages of work for the first defendant:

(a) engineering and designing the substation and its equipment;

(b) procurement;

F (c) manufacturing;

(d) testing at factory only;

(e) delivery (FOB for imported items, ex-site delivery for locally procured equipments or materials); and

G (f) Commission Substation Control System ('SCS') for all the new substations under both purchase orders.

[16] In the engineering and designing stage, the plaintiff's engineers and H suppliers would be involved. The engineers were to design the substation layout. The suppliers were to design and manufacture equipment for the substations. To design the substation layout, the plaintiff would require the site survey plan and wayleave transmission. 'Wayleave transmission' means the right of way secured by TNB to construct the substation and aligned to I the planned transmission route to connect the substation to the grid. Wayleave clearance is required to confirm that TNB has secured the right of way from third party landowners to go ahead with construction of the substation site with TNB transmission planning. The plaintiff cannot design the substation without the site survey plans and wayleave transmission. The

plaintiff requested for these details from the first defendant when it commenced work. The plaintiff's suppliers were required to produce manufacturing drawings and engineering calculations for submission to the first defendant for TNB's approval. The drawings were submitted for approval.

[17] The second stage is procurement. Procurement would start after the first defendant makes available the specification of the equipment to be supplied to the plaintiff. Once the plaintiff received the specification, it would forward it to the suppliers who would in turn indicate the costs of the supply. The plaintiff would issue a purchase order if the costs indicated by the suppliers were acceptable to the plaintiff. The purchase orders that the plaintiff had issued to the suppliers stipulated the payments terms to be: FOB and 45 days credit for the orders placed by the plaintiff.

[18] The third stage is manufacturing. Before actual manufacturing starts, the plaintiff's suppliers and engineers are required to prepare detailed drawings and calculations for the equipment and layout, which is to be forwarded to the first defendant to obtain TNB's approval. Manufacturing cannot proceed without TNB's approval. The first defendant ordered standard and specialised equipments. Standard equipments are manufactured locally. The plaintiff can only proceed with manufacturing of standard equipments after the substation site is made available by the first defendant or TNB to start construction works. Specialised equipments are manufactured overseas and locally. The plaintiff can only start purchasing specialised equipments for on going substations and not for those which are put on-hold due to unavailability of site.

[19] The fourth stage is testing. Once TNB's approval is obtained, the equipments are manufactured and factory tested and ready to be delivered.

[20] The fifth stage is delivery. Before delivery, confirmation of site availability date and site survey is critical. This is because without the site availability date and the survey, the plaintiff cannot:

(a) plan the delivery schedule;

(b) design and calculate earthing for substation and determine quantity of copper required to earth the station;

(c) do the building design as this determines the panel layout, control and power cable routing and panel earthing to finalise the quantity of cables copper and cable ladders;

(d) trench design to determine quantity for cable copper and cable ladders to be purchased; and

(e) do the transmission line landing.

[21] In short, the plaintiff's scope of work was primarily equipment supplies. The plaintiff's scope includes submission of drawings and designs, current transformers calculation, substation layout design and switch layout design. Other than supply of batteries to the substation and testing and commissioning of substations (except for the station control system) the rest of the equipment supply portion was the plaintiffs responsibility.

[22] It is the contention of the plaintiff that the first defendant repudiated the subcontract when it not only failed to pay the plaintiffs outstanding invoices but had in fact diverted monies from the TNB contract No 632/97 which were supposed to be assigned to the plaintiff as payment of the plaintiffs invoices to the first defendant.

[23] The plaintiff has also alleged that the first defendant had repudiated the subcontract and in breach of the following acts:

(a) inconsistent instructions on status of substations;

(b) cancellation of five substations;

(c) relocations of substations;

(d) revised scope of works and variation orders;

(e) delay in approval of drawings;

(f) lack of information;

(g) additional last minute requirements;

(h) delayed confirmation of technical and CT calculations;

(i) failure to grant extension of time; and

(j) unilateral takeover of substations.

[24] These breaches of contract resulted in losses suffered by the plaintiff and hence, the present claims made by the plaintiff against the first defendant.

THE FIRST DEFENDANT'S DEFENCE AND COUNTERCLAIM

[25] The first defendant's defence to the plaintiff's claim can be summarised as this. The 1997 currency crisis caused an economic downturn that resulted in reduced demand for electricity supply. TNB, the second defendant had to review its projects. Cost was a major issue. TNB's initial reaction was that it had to either defer or cancel substations to reduce costs.

But later this whole idea of deferment or cancellation was shelved. Instead, TNB came up with the rehabilitation programme. In this programme, all equipments that were procured for substations that were supposed to be deferred or cancelled would be relocated to substituted substations if they are found to be suitable and applicable. Those found not suitable and applicable would become TNB's responsibility as to costs and storage.

[26] With regard to the rehabilitation programme, the plaintiff contended that the effect was an entirely new contract. But the first defendant contended that it was a variation of the subcontract that does not give the plaintiff the opportunity to revise and increase the agreed contractual price. The first defendant grounded its right to order variation on cl 10 of the standard general conditions of contract to unilaterally effect variation up to 15% in the works.

[27] The first defendant mentioned several reasons why cost would remain the same. To the first defendant the plaintiff is not permitted to ask for a revision in the agreed price, inter alia, for the following reasons:

(i) the subcontract was a lump sum contract where the unit price is fixed. The plaintiff bears the risk of costs fluctuations (see para 9 of defence and counterclaim);

(ii) equipment to be supplied need not necessarily be specifically designed for the substations mentioned (see para 18 of defence and counterclaim);

(iii) the quantity of electrical components employed would remain substantially the same even though when the equipment is delivered to the site for erection and installation some adjustments had to be made through arrangement or configuration of the equipment components supplied (see para 18.2 and 19 of defence and counterclaim);

(iv) due to the plaintiff and TNB's long business relationship, the plaintiff ought to know the equipment required, the type and make of the equipment and the quantity for any particular substations (see para 18.3 of defence and counterclaim);

(v) the type, make and quantity of the equipment are not conditional on the substation layout. The total cost for the equipments remain the same for any particular substation notwithstanding some changes in the equipments' configuration (see para 19 of defence and counterclaim);

(vi) the plaintiff ought to have timed its procurement or hedge its funds in order to secure equipments at the contracted price. The plaintiff could have completed procurement from their suppliers and confirm the price

before it secured the tender from the first defendant (see paras 20.1, 20.2, 25.5 and 25.7 of defence and counterclaim);

(vii) procurement is not conditional upon approval of the drawings and calculations and confirmation of site availability and site survey plan. Procurement could have proceeded and prices with suppliers secured even though approval of drawings and calculations were delayed; and

(viii) the discontinuation of the plaintiff's contract for Mainheads A and C and Mainhead G affected the plaintiff's internal pricing (see para 23.1 and 23.2 of defence and counterclaim).

[28] The first defendant alleged that the plaintiff had breached the subcontract principally by: (i) stopping work without the first defendant's instructions; (ii) failing to deliver the Substation Control System ('SCS') for PUB (Bulk) Substation; and (iii) failing to deliver MV Switchgears. As a result the first defendant had to take over and complete the works.

[29] Due to the foregoing alleged breaches, the first defendant claimed that:

(i) it had been exposed to liquidated and ascertained damages ('LAD');

(ii) it had to incur substantial additional costs and expenses in procuring the same equipments from alternative suppliers; and

(iii) it is entitled to the retention sum.

[30] For these reasons, the first defendant counterclaimed:

(i) for LAD, the first defendant contends it had been exposed to LAD at the rate of 1% of the contract value of such delayed portion for each week's delay;

(ii) the first defendant's RM7,066,059.80 bank guarantee to the second defendant is jeopardised arising from the intimation of the second defendant for the imposition of liquidated and ascertained damages; and

(iii) increased costs and expenses expected to be incurred arising from the procuring of same equipment from alternative suppliers. The estimated amount is set out in para 38.5 of the defence and counterclaim.

DECISION OF THE COURT

(1) *Failure to pay outstanding invoices*

[31] The plaintiff contended that the first defendant's payment records were bad. There were delays and non-payment. PW1 testified that the first

defendant had to be constantly reminded about payment. By letters dated 17 December 1998, 7 April 1999 and 19 April 1999, the plaintiff repeatedly appealed to the first defendant for payment, (see pp 238, 285 and 294–299 of bundle ABD2).

[32] In the letter dated 19 April 1999, it is noted that the plaintiff attached a list of all the invoices that were outstanding at that time. The plaintiff informed the first defendant that payment is a total of 2333 days late for Mainhead D and 1743 days for Mainhead F. The plaintiff also said that the payment term as per TNB general condition of contracts be maintained. The plaintiff informed the first defendant that with the 60 days to pay the plaintiff's invoices, the first defendant has 16 days to prepare its invoices to TNB.

[33] There were meetings held to resolve the outstanding payments issue but they were not fruitful. Payments were still outstanding. For instance, on 21 April 1999, the first defendant, the plaintiff and TNB met. The first defendant and the plaintiff told TNB that the outstanding payments have put them in a very tight cash flow situation. When the first defendant told TNB that the plaintiff intended to impose interest on late payments, TNB requested the plaintiff not to do so. The minutes of this meeting is in bundle ABD2 at p 301. After this meeting, TNB paid RM477,442.57, USD3,159,927.38 and USD660,201.62 respectively. TNB's letters dated 13 April and 12 May 1999 for these payments is in bundle ABD3 at pp 326 and 329.

[34] But despite the foregoing payments, there were still invoices for 1999 and one invoice for 1998 that remain unpaid. Except for the testimony of DW3 the first defendant did not offer any evidence to challenge the plaintiff's entitlement to the monies owing.

[35] It is noted that the point of contention of the first defendant for not paying is that the first defendant had overpaid. This is because payment for the FOB portion was to be made at the rate of RM2.53 for every US Dollar and not RM3.80 for every US Dollar. However, in my view this fails to take into account the following terms or factors:

(i) payment for the FOB portion was to be in US Dollars;

(ii) at all material times, payment was made by TNB to the first defendant in US Dollars; and payment by the first defendant to the plaintiff was also in US Dollars for FOB portion; (see letter dated 3 December 1998, which is in bundle ABD1 at pp 75–76 where TNB agreed to pay in Ringgit Malaysia and US Dollars);

(iii) the invoices by the plaintiff for the FOB portion throughout the contract were in US Dollars;

(iv) this issue was raised as an afterthought only when the action was filed. There is not even a single contemporaneous document by which the first defendant raised the issue of overpayment; and

(v) the first defendant by having consented in the consent order dated 2 April 2001 to pay the plaintiff RM9,900,000 of which it had paid RM9,600,000 leaving a balance of RM300,000, has waived all rights to challenge the total amount of invoices outstanding and hence, the current balance outstanding sum of RM314,482.94 stands. Besides, there is no counterclaim by the first defendant for the alleged overpayment and hence this issue of which exchange rate applies is in reality a non-issue.

[36] In short, payment for the FOB portion was to be made in US Dollars and not in Ringgit. Hence, there was no exchange rate issue. Payment in US Dollars when translated in Ringgit would be based on the then existing rate, which was RM3.80, the applicable rate since 1998 until recently.

[37] The parties' witnesses' testimonies on this issue are in agreement. During re-examination PW1 when referred to the quotation letter dated 14 June 1996 (ABD1 pp 11–13), testified that *the exchange rate is not fixed. At this point of the order the exchange rate was at 2.503. Subsequently in 1998 we were paid in two forms of currencies. Based on the deed of assignment there were portions paid in US Dollars and Ringgit Malaysia. The US Dollars portion was paid at the prevailing market rate. The defendants were paid in similar way the plaintiffs were paid*.

[38] This position was agreed by the first defendant's witnesses. DW2 during cross-examination testified that '*bayaran balik oleh plaintif kepada defendan adalah mengikut kadar US Dollar semasa iaitu Dollar US bersamaan dengan RM3.80. Saya sahkan dalam penyata akaun di ms 328 dalam ABD3 bayaran dibuat mengikut kadar semasa*'.

[39] I am of the view based on the above, the first defendant has no excuse for not paying the plaintiff.

(2) *The first defendant unlawfully diverted monies meant to be paid to the plaintiff*

[40] The first defendant agreed to assign payments due from TNB under TNB's contract No 632/97 to the plaintiff as payment of the plaintiff's invoices to the first defendant. There was the deed of assignment. The first

defendant agreed to assign RM37,734,240.30 and USD15,611,525.48 to the plaintiff. By letter dated 3 December 1998, TNB consented to the assignment.

[41] This was the agreed arrangement on invoicing for the purpose of payment. The plaintiff will first invoice the first defendant for the transmission equipment supplied. The first defendant will then invoiced TNB and instruct TNB to pay the plaintiff's invoiced amount into the plaintiffs bank account. The first defendant would add a 3% margin in its invoice to TNB. In other words, TNB will only pay the plaintiff 97% of the first defendant's invoiced amount. The balance 3% goes to the first defendant. TNB will certify payment and state the first defendant's and the plaintiff's respective portion before payment is made. Proof of this payment assignment arrangement is found in the following documents:

(i) TNB gave consent to the assignment via letter dated 3 December 1998 (see pp 75–76 of bundle ABD1);

(ii) on 22 March 1999 TNB confirmed that RM37,734,240.30 will be paid to the plaintiff's Hong Kong Bank account (see p 282 of bundle ABD2);

(iii) on 30 April 1999 TNB informed the first defendant that RM477,442.57 and USD3,159,927.38 is being paid to the plaintiff's account certificates 23, 24 and 25 as attached (see p 326 of bundle ABD3);

(iv) on 12 May 1999 TNB informed the first defendant that USD660,201.62 is being paid to the plaintiff's account, (see p 329 of bundle ABD3);

(v) on 14 May 1999 the first defendant instructed TNB to pay the plaintiff USD97,729.70 to the plaintiff's account (see p 327 of bundle ABD3);

(vi) on 18 May 1999 TNB informed the first defendant that payment for certificates 28 and 29 are being made to the first defendant and the plaintiff's account (see p 324 of bundle ABD3); and

(vii) on 18 May 1999 the first defendant instructed TNB to pay the plaintiff USD20,418.60 to the plaintiff's account (see p 330 of Bundle ABD3).

[42] The documents hereinbefore referred not only show the existence and operation of the assignment which is recognised by the first defendant and TNB, it also goes to show that the liability to pay the plaintiff remained with the first defendant, an obligation which is not in dispute. The assignment arrangement was merely a method of payment with the obligation to pay firmly remaining with the first defendant. The documents also prove that 97% of the invoiced amount belongs to the plaintiff to which only the

plaintiff is entitled. Despite this, the plaintiff discovered the first defendant was breaching the subcontract by going behind its back and diverting the payments from TNB.

[43] In early January 2000, the plaintiff discovered that the first defendant had instructed TNB to pay USDl,649,232.34 into the first defendant's account with Bank Bumiputra Malaysia Berhad. Proof of the instruction is in the first defendant's invoices to TNB itself. TNB's payment was for ten invoices issued by the first defendant. They are as follows:

First Defendant's Invoice	Amount (USD) Invoice	Reference to Bundle AB D4 at Pages
JE/MT/04/04	210,148.68	884–891
BEH/MT/05/08	437,791.74	875–883
BER/MT/04/04	154,742.92	839–844
BEH/MT/06/09	1,982.80	855–859
TR/MT/04/04	118,178.67	845–854
KUL/MT/07/07	147,078.89	816–837
BEH/MT/07/10	225,084.20	860–874
JEL/MT/05/05	161,914.36	892–901
BER/MT/05/05	83,976.12	828–838
BP/MT/07/07	108,333.96	-

[44] In each invoice mentioned above, there was an instruction by the first defendant to TNB to make payment into the first defendant's bank account with Bank Bumiputra Malaysia Bhd. These instructions started on 25 January 2000 as can be seen from bundle ABD4 at p 816. The first defendant's invoices mentioned above were certified by TNB. TNB's certificate 43 (in bundle ABD4 at p 967) is the certificate. It mentions all ten invoices and the first defendant as the payee. Payment of the certified amount was made to the first defendant's Bank Bumiputra Malaysia Sdn Bhd Account No 0012987436. These evidence show how the first defendant had diverted and pocketed the entire certified sum of USD1,649,232.34 itself.

[45] It has to be stated here that the 97% of this sum of USD1,649,232.34 (which equals to USD1,599,75.36) that TNB had paid to the first defendant belongs to the plaintiff. This is because 97% of what the first defendant invoiced TNB and is paid on the said invoice, is based on what the plaintiff invoiced the first defendant who then adds 3% to that amount and invoice TNB. The first defendant's invoices are supported by the plaintiff's documents which the plaintiff produced and attached to its invoices when it presented its invoices to the first defendant for payment. What the first defendant did was to add 3% to the plaintiff's invoice amount and used the

plaintiff's supporting documents as its own supporting document to present to TNB together with its own invoices for payment. DW2 agreed during cross-examination that for all of the plaintiff's claims, there would be a 3% increase by the first defendant when it issued invoices to TNB.

[46] It has also to be stated here that when the plaintiff discovered the first defendant's breach of the subcontract, the plaintiff sprung into action and obtained a Mareva injunction on 8 September 2000 to freeze the first defendant's account with Bumiputra Commerce Bank Bhd Kuala Lumpur. This order was extended with the agreement of the parties to 2 April 2001 when the first defendant partially settled this action with the plaintiff by recording a consent order under which, the first defendant agreed to pay the plaintiff RM9,900,000. As earlier mentioned, the first defendant had only paid RM9,600,000 leaving a balance of RM300,000 under the consent order unpaid.

[47] It is my judgment based on the consent order, the Mareva injunction and all the documentary and oral evidence adduced by the plaintiff would prove conclusively that the first defendant had breached the subcontract by diverting and pocketing the assigned payments from TNB. The first defendant's deliberate act of diverting the money is without doubt an act that had repudiated the subcontract which entitles the plaintiff to consider itself no longer bound by the subcontract. In *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9, the Federal Court accepted the principle that where there is a general refusal to pay, such an act is a repudiation of the contract. The Federal Court quoted with approval the following passage from *Hudson's Building Contract*:

> The tendency has been to hold that mere non-payment of an instalment due in respect of goods does not constitute a repudiation, while a general refusal to pay instalments on the due date will do so.

[48] It is my considered view this act of diversion alone entitles the plaintiff to treat that the first defendant as having repudiated the subcontract.

(3) *The first defendant delayed and disrupted the plaintiff's performance*

[49] It is my finding that the first defendant breached the subcontract when it delayed and disrupted materially the plaintiff's performance of the subcontract causing the plaintiff to suffer various losses and expenses.

[50] In the performance of the subcontract the first defendant is under a duty to cooperate and a duty of non-prevention. These duties require the first defendant to cooperate with the plaintiff to enable the plaintiff to carry out

its work in a regular and orderly manner and for the first defendant not to impede the plaintiff from carrying out its obligations in a regular and orderly manner. In *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, Lord Simon stated that:

> Generally speaking where B is employed by A to do a piece of work which requires A's cooperation it is implied that the necessary cooperation will be forthcoming.

[51] In *Barque Quilpu Ltd v Brown* [1904] 2 KB 264, Vaughan Williams LJ stated that:

> There is an implied contract by each party that he will not do anything to prevent the other party from performing a contract or to delay him in performing it. I agree that generally such a term is by law imported into every contract.

[52] The plaintiff's records showed that during a meeting between the first defendant and the plaintiff on 2 October 1997, the plaintiff gave the site handing over dates based on the schedule, (see pp 31–32 of bundle ABD2). The plaintiff informed the first defendant of its commitment in ensuring that the civil work will be completed as scheduled and would determine that the project could be finished in the stipulated time. However, site availability was only given much later from the originally scheduled dates. Here is where the first defendant failed in its duties to the plaintiff.

(4) *Inconsistent instructions on status and availability of the sub-stations*

[53] The plaintiff's witness PW1 testified that there were inconsistent instructions involving Mainhead D's and Mainhead F's substations. This was corroborated by the first defendant's witness DW1 who during cross-examination confirmed that there were inconsistent instructions from TNB on the status of the substations. It can be said that the first defendant's instructions flip-flopped between deferment, cancellation and relocation. Below is shown how the instructions were inconsistent.

Mainhead D

(i) Mainhead D — KULIM HITECH

[54] In October 1997 the plaintiff asked for site handing over on mid July 1998 but as at January 1998 the status of the site was 'to be announced' ('tba'). The tba status is confirmed by the plaintiff (see p 47 of bundle ABD1).

[55] By letter dated 2 July 1998 TNB informed the first defendant that this substation is deferred but TNB reserved its right to renegotiate the schedule and completion dates.

[56] By letters dated 15 July 1998 and 1 December 1998, the first defendant instructed the plaintiff to concentrate all available resources on other priority substations but not Kulim as this site is not available. Then on 30 December 1998, TNB cancelled this substation.

[57] The plaintiff confirmed on 15 November 1999 that there was no manufacturing progress on the Medium Voltage Switchgears (which is a locally manufactured equipment) for this substation since it is cancelled. On 2 April 2000 the first defendant told the plaintiff that part of the 275KV and 132KV for Kulim substation is relocated to Behrang.

(ii) Mainhead D — BEHRANG

[58] Site handing over for this substation was supposed to be 1 August 1998 according to the plaintiff's schedule which was sent to the first defendant via fax dated 24 September 1997 (see p 29 of bundle ABD2).

[59] On 10 October 1997 and 9 February 1998 the plaintiff confirmed Behrang as a priority substation. But on 22 December 1997 TNB issued a stop work order. However, following meetings held, the plaintiff confirmed on 2 and 3 March 1998 that Behrang substation is on again. The first defendant replied in its letter dated 10 March 1998 and said it is not sure about whether Behrang will be constructed. TNB however confirmed on 27 March 1998 that Behrang will proceed (see p 55 of bundle ABD1).

[60] On 2 July 1998 TNB informs the first defendant about deferment of this substation and reserving its right to renegotiate the schedule and completion dates. The first defendant however informed the plaintiff on 15 July 1998 that Behrang is a priority substation (see p 63 of bundle ABD1).

[61] On 1 December 1998 the first defendant gave the plaintiff a list of priority substations. Behrang is not in the list. Then, TNB cancelled Behrang on 30 December 1998. DW1 agreed during cross-examination on 3 January 2005 that TNB issued a stop work order for Behrang. But on 15 September 1999, the first defendant informed the plaintiff that Behrang is relocated to Skudai and asked the plaintiff to quote its new price for the relocated substation. On 4 October 1999, the plaintiff submitted its price for Skudai substation. On 25 April 2000 the first defendant informed the plaintiff that Behrang substation is revived but part of the scope of works for this station is omitted. Part of the 275KV and 132KV from Kulim is relocated to Behrang.

(iii) Mainhead D — SG PERANGIN (relocated to Proton City)

[62] According to the plaintiff's schedule this site is supposed to be handed

over on 1 May 1998 (see p 32 of bundle ABD2). On 3 December 1997 the first defendant informed the plaintiff that Proton City will replace Sg Perangin. On 9 February 1998 the plaintiff confirmed Proton City as a priority station following a discussion with the first defendant. On 3 March 1998, the plaintiff confirmed that half of the station will proceed. On 15 July 1998 the first defendant push the delivery date to end December 1998 (see p 63 of bundle ABD1).

[63] On 1 September 1998 TNB informed the first defendant it intends to review the status and scope of this substation together with eleven others under the contract. The plaintiff provided the status and indicative cancellation charges on 7 October 1998. On 16 October 1998 the first defendant told the plaintiff that this substation is no longer a priority (see p 209 of bundle ABD2). TNB however confirmed on 30 November 1998 that this substation proceeds and its intention to reduce the scope of works for it.

[64] On 1 December 1998 the first defendant fixed the commissioning date to be July 1999. The original testing and commissioning date for this substation is from mid July to September 1998.

(iv) Mainhead D — BERCHAM

[65] In October 1997 the site is supposed to be handed over in mid April 1998 but the plaintiff confirmed in January 1998 that the site handover date is still to be announced. On 13 January 1998 the plaintiff informed the first defendant that delivery is commencing on July 1998. On 2 July 1998 TNB informed the first defendant about deferment of this substation and reserving its right to renegotiate the schedule and completion dates.

[66] On 15 July and 1 December 1998, the first defendant asked the plaintiff to concentrate all resources on priority substations. Bercham is not a priority. Then, TNB cancelled Bercham on 30 December 1998. On 15 September 1999 the first defendant informed the plaintiff that Bercham is relocated to Pasir Gudang and asked the plaintiff to quote its new price for the relocated substation. On 4 October 1999 the plaintiff submitted its price for Pasir Gudang substation.

(v) Mainhead D — HUTAN MELINTANG

[67] In October 1997 the site is supposed to be handed over on 1 September 1998 but the plaintiff confirmed in January 1998 that the site handover date is still to be announced. On 13 January 1998 the plaintiff informed the first defendant that delivery is commencing on July 1998. On

9 February 1998 the plaintiff confirmed this substation as a priority substation. On 2 July 1998 TNB informed the first defendant about deferment of this substation and reserving its right to renegotiate the schedule and completion dates. On 15 July 1998 the first defendant made this substation a priority station.

[68] On 1 September 1998 TNB informed the first defendant that it intends to review the status and scope of this substation together with eleven others under the contract. The plaintiff provided the status and indicative cancellation charges on 7 October 1998. TNB confirmed on 30 November 1998 that this substation proceeds and its intention to reduce the scope of works for it. On 1 December 1998 the first defendant fixed the commissioning date to be October 1999 (see p 73 of bundle ABD1). The original testing and commissioning date for this substation is from November to mid December 1998.

(vi) Mainhead D — JELAPANG

[69] In October 1997 the site handover date according to the plaintiff's schedule is mid May 1998. On 22 December 1997 TNB put this substation on hold. On 27 March 1998 TNB decided to proceed with this substation.

[70] On 2 July 1998 TNB informed the first defendant about deferment of this substation and reserving its right to renegotiate the schedule and completion dates. On 15 July and 1 December 1998, the first defendant asked the plaintiff to concentrate all resources on priority substations. Jelapang is not a priority. On 1 September 1998 TNB informed the first defendant it intends to review the status and scope of this substation together with eleven others under the contract. The plaintiff provided the status and indicative cancellation charges on 7 October 1998. TNB cancelled Jelapang on 30 December 1998.

[71] The plaintiff confirmed on 15 November 1999 that there was no manufacturing progress on the Medium Voltage Switchgears (equipment locally manufactured) for this substation since it is cancelled. On 25 April 2000 the first defendant informed the plaintiff that Jelapang substation will be revived.

(vii) Mainhead D — GUNUNG RAPAT (relocated to Santong)

[72] In October 1997 the site hand over date according to the plaintiff's schedule is mid July 1998. On 22 December 1997 TNB put this substation on hold. On 10 April 1998 the plaintiff confirmed Gunung Rapat substation

A is relocated to Santong. On 2 July 1998 TNB informed the first defendant about deferment of this substation and reserving its right to renegotiate the schedule and completion dates.

B **[73]** On 15 July and 1 December 1998 the first defendant asked the plaintiff to concentrate all resources on priority substations. This includes Gunung Rapat. On 1 September 1998 TNB informed the first defendant it intends to review the status and scope of this substation together with eleven others under the contract (see p 182 of bundle ABD2). The plaintiff provided the status and indicative cancellation charges on 7 October 1998. On C 16 October 1998 the first defendant told the plaintiff that the commissioning date for this substation is end January 1999.

[74] TNB confirmed on 30 November 1998 that this substation proceeds D and its intention to reduce the scope of works for it. The first defendant makes this substation a priority on 1 December 1998 and fixed the commissioning date as June 1999.

Mainhead F

E (i) Mainhead F — BATU PAHAT

[75] In October 1997 the site handover date according to the plaintiff's schedule is mid May 1998 but the plaintiff confirmed in January 1998 that F the site handover date is still to be announced. On 13 January 1998 the plaintiff informed the first defendant that delivery is commencing on June 1998. On 9 February 1998 the plaintiff confirmed this substation as a priority substation. On 15 July 1998 the first defendant asked the plaintiff to concentrate all resources on priority substations. Batu Pahat is not a priority.

G

[76] On 1 December 1998 the first defendant asked the plaintiff to concentrate all resources on priority substation. Batu Pahat is a priority but site is unavailable. On 25 and 31 January 2000 the first defendant confirmed the relocation of Batu Pahat to Sg Mati. The plaintiff was asked to come up H with a detailed proposal on the bill of quantities and pricing. On 2 December 2000 the first defendant informed the plaintiff that Sg Mati is not required because the wayleave problem for Batu Pahat is solved. However the plaintiff was asked to submit prices to build temporary autotransformer at Sg Mati.

I (ii) Mainhead F — JEMENTAH

[77] In October 1997 the site handover date according to the plaintiff's schedule is 1 June 1998 but the plaintiff confirmed in January 1998 that the site hand over date is still to be announced. On 13 January 1998 the plaintiff

informed the first defendant that delivery is commencing on May 1998. On 14 January 1998 the first defendant informed the plaintiff that the site is not available and no works are to proceed. On 15 July 1998 the first defendant informed the plaintiff that Jementah is a priority and delivery expected in December 1998. On 1 September 1998 TNB informed the first defendant it intends to review the status and scope of this substation together with eleven others under the contract. The plaintiff provided the status and indicative cancellation charges on 7 October 1998.

[78] TNB confirmed on 30 November 1998 that this substation proceeds and its intention to reduce the scope of works for it. The first defendant made this substation a priority on 1 December 1998 and fixed the commissioning date as August 1999. On 6 January 1999 the first defendant agreed with TNB to reduce the scope of work and revised the completion date to end September 1999.

(iii) Mainhead F — SRI GAPING

[79] In October 1997 the site handover date according to the plaintiff's schedule is 1 July 1998 but the plaintiff confirmed in January 1998 that the site hand over date is still to be announced. On 13 January 1998 the plaintiff informed the first defendant that delivery is commencing on June 1998. On 15 July 1998 the first defendant informed the plaintiff that Sri Gading is a priority and delivery is expected in December 1998. On 16 October 1998 the first defendant told the plaintiff that the commissioning date for this substation is end December 1998. The first defendant makes this substation a priority on 1 December 1998 and fixed the commissioning date as August 1999.

(iv) Mainhead F — KOTA PUTRI

[80] In October 1997 the site hand over date according to the plaintiff's schedule is 1 August 1998 but the plaintiff confirmed in January 1998 that the site hand over date is still to be announced. On 13 January 1998 the plaintiff informed the first defendant that delivery is commencing on July 1998. On 2 July 1998 TNB informed the first defendant about deferment of this substation and reserving its right to renegotiate the schedule and completion dates.

[81] On 15 July 1998 the first defendant asked the plaintiff to concentrate all resources on priority substations. Kota Putri is not a priority. On 9 July 1998 the first defendant informed the plaintiff to relocate equipment to Tg Langsat and to propose relay for replacement. TNB's letter of 16 June 1998 to the first defendant specifically states that this relocation must be with no

A additional costs to TNB. On 1 September 1998 TNB informed the first defendant it intends to review the status and scope of this substation together with eleven others under the contract. The plaintiff provided the status and indicative cancellation charges on 7 October 1998. On 16 October 1998 the first defendant told the plaintiff that the commissioning date for this
B substation 1 is end December 1998. On 1 December 1998 the first defendant asked the plaintiff to concentrate all resources on priority substation. Kota Putri is a priority and delivery is expected in September 1999.

(v) Mainhead F — RENGIT

C

[82] In October 1997 the site hand over date according to the plaintiff's schedule is mid July 1998 but the plaintiff confirmed in January 1998 that the site handover date is still to be announced. On 13 January 1998 the
D plaintiff informed the first defendant that delivery is commencing on August 1998. On 9 February 1998 the plaintiff confirmed this substation as a priority substation. On 2 July 1998 TNB informed the first defendant about deferment of this substation and reserving its right to renegotiate the schedule and completion dates.

E

[83] On 15 July 1998 the first defendant asked the plaintiff to concentrate all resources on priority substations. Rengit is a priority. On 29 July 1998 the first defendant enclosed TNB's letter to first defendant dated 7 July 1998 informing that equipment from Rengit be transferred to Tg Karang. On
F 1 September 1998 TNB informed the first defendant it intends to review the status and scope of this substation together with eleven others under the contract. The plaintiff provided the status and indicative cancellation charges on 7 October 1998.

G

[84] TNB confirmed on 30 November 1998 that this substation proceeds and its intention to reduce the scope of works for it. On 1 December 1998 the first defendant asked the plaintiff to concentrate all resources on priority substation. Kota Putri is a priority and delivery is expected in January 1999.

H

(vi) Mainhead F — PUB BULK

[85] In October 1997 the site hand over date according to the plaintiff's
I schedule is mid June 1998 but the plaintiff confirmed in January 1998 that the site hand over date is still to be announced. On 13 January 1998 the plaintiff informed the first defendant that delivery is commencing on June 1998. On 15 July 1998 the first defendant asked the plaintiff to concentrate all resources on priority substation. PUB Bulk is not a priority.

[86] On 1 September 1998 TNB informed the first defendant it intends to review the status and scope of this substation together with eleven others under the contract. The plaintiff provided the status and indicative cancellation charges on 7 October 1998. TNB confirmed on 30 November 1998 that this substation proceeds and its intention to reduce the scope of works for it. On 1 December 1998 the first defendant asked the plaintiff to concentrate all resources on priority substation. PUB Bulk is a priority and delivery is expected in September 1999.

(vii) Mainhead F — TAMAN RINTING

[87] In October 1997 the site handover date according to plaintiff's schedule is mid June 1998. On 13 January 1998 the plaintiff informed the first defendant that delivery is put on hold. Following the schedule erection is supposed to commence in June 1998. On 15 July 1998 the first defendant asked the plaintiff to concentrate all resources on priority substations. Taman Rinting is not a priority.

[88] On 1 September 1998 TNB informed the first defendant it intends to review the status and scope of this substation together with eleven others under the contract. The plaintiff provided the status and indicative cancellation charges on 7 October 1998. On 1 December 1998 the first defendant asked ABB to concentrate all resources on priority substation. Taman Rinting is still not a priority.

[89] It can be observed from the above there were indeed many inconsistency in the instructions concerning the status of the substations. One moment delivery date for the substation was confirmed but the next delivery is to be advised. Substation that was good to go was instructed to be put on hold then cancelled. Some were revived, some relocated and some cancelled again. The consequences were that the subcontract could not proceed as scheduled. Ordering, purchasing and manufacturing were disrupted and overall delay resulted and the subcontract was unnecessarily extended. Extension to the subcontract resulted in additional costs and expenses.

(5) *The first defendant unlawfully cancelled five substations*

[90] It is noted that the first defendant cancelled five substations and omitted them from the plaintiff's scope of work. The five cancelled substations were Jelapang, Behrang, Bercham, Kulim and Taman Rinting. The first defendant informed the plaintiff about the cancellation sometime in November 1998. The cancellation was later confirmed by TNB via letter dated 30 December 1998. However, the first defendant's letter dated

14 October 1998 proves that the first defendant knew about TNB's intention of cancellation much earlier. I am of the view that the cancellation was unlawful and a breach of the subcontract by the first defendant.

[91] The first defendant has no right to cancel the five substations. Nothing in the subcontract permits it. Cancelling the substations is basically an act of varying the subcontract when no such right exists under the subcontract. Without an express right in the subcontract to order variation, the first defendant is not entitled to unilaterally order the cancellation. Any changes to the subcontract cannot be decided by the first defendant alone. It must be mutually agreed. The first defendant requires the consent of the plaintiff to effect the cancellation of the five substations which was a fundamental change to the subcontract. Hence, the first defendant's act of cancelling the five substations is a clear breach of the subcontract.

[92] Even if the first defendant has any right to order variation, it has no right to make such a fundamental change to the subcontract. Cancelling five substations is not a minor variation. It was so extensive and radical to the extent it cannot be considered a variation at all. Those five cancelled substations equaled in value to RM36,561,205.93 or 50.76% of the subcontract value. The cancellation of the substations drastically affected the subcontract both in terms of pricing and scope. In a situation like this, the first defendant is not entitled to assert that the original contract price stands. In *Yong Mok Hin v United Malayan States Sugar Industries Ltd* [1967] 2 MLJ 9, the Federal Court approved a Privy Council decision from India, *Sahu Ram Kumar v Muhammad Yakub & Anor* AIR 1924 PC 123 which held, inter alia, that where as a result of additions made to the original contract the cost of construction became so substantial as to almost double the original cost then the cost should be attributed to a new arrangement between the parties. This principle holds true also for a situation involving deletion. In *Chadmax Plastics v Hansen and Yuncken* [1986] 1 BCL 52, the main contract was varied by deleting 98% of the specified wall finish. The Full Court of South Australia held that this amounted to a virtual cancellation of the subcontract and was not authorized by the subcontract and was not within the general scope of the agreement. The said court held that the contractor was guilty of repudiating the contract and liable for damages to the subcontractor.

(6) *The first defendant relocated substations*

[93] The first defendant relocated several substations. According to PW1, relocation of the substation means shifting of the site mentioned in the purchase order to other new site. The substations relocated are as follows.

[94] By letter dated 27 March 1998, TNB ordered the relocation of Gunung Rapat substation to Santong; and Taman Rinting substation to Johor Port. By TNB's letter dated 26 March 1998 and the first defendant's letter dated 9 July, the equipments listed for Kota Putri was transferred to Tg Langat. By the first defendant's letter dated 15 July 1998 the first defendant ordered the plaintiff to transfer equipments from Rengit to Tg Karang. By the first defendant's letter dated 25 April 2000 the first defendant ordered the plaintiff to transfer the 275KV and 132KV equipments from Kulim to Behrang.

[95] By the first defendant's letter dated 15 September 1999 the first defendant relocated Behrang and Bercham to Skudai and Pasir Gudang. The first defendant also requested for a price schedule and the plaintiff gave a quotation on 4 October 1999. By the first defendant's letters dated 25 and 31 January 2000 the first defendant relocated Batu Pahat to Sg Mati. On 4 February 2000 the plaintiff informed the first defendant it will revert on the price for the relocation to Sg Mati. On 21 February 2000 the first defendant tells the plaintiff that Sg Mati is not needed because the wayleave problem at Batu Pahat is solved. Instead the first defendant requests the plaintiff to submit price schedule for works involved in constructing a temporary autotransformer at Sg Mati.

[96] On 21 February 2000 the plaintiff informed the first defendant that the plaintiff will not submit any further quotations until and unless all previous quotations have been given due consideration. On 3 May 2000 the plaintiff informed the first defendant that there will be costs implications for all submissions prepared by the plaintiff which has been totally ignored by the first defendant.

[97] As regards the cancellation of the five substations, it is my view that the first defendant has no right to relocate substations and certainly cannot forced the plaintiff to do so without any form of compensation or reimbursements of costs. Relocating the substations was basically an act of varying the subcontract. The plaintiff was required to carry out work at different sites. Even DW1 when cross-examined agreed that if a substation's site is relocated it is a new substation and everything must start all over again. PW1 testified that the plaintiff considers the relocation as a new contract because if it was a relocation the prevailing market rate will apply.

(7) *The first defendant revised the scope of works without any compensation to the plaintiff*

[98] The first defendant reduced the plaintiff's scope of works and refused to make any compensation for the costs involved. The reduction came about

this way. On 6 January 1999, TNB and the first defendant had a meeting. In this meeting the first defendant agreed with TNB's request to reduce the scope of work. The substations affected were Gunung Rapat (Santong), Jementah, Sg Perangin (Proton City), PUB Bulk and Rengit. TNB requested for the feeders to be reduced. The first defendant agreed with TNB that there shall not be any cost/contractual implications to both parties due to the new extended date and the reduction in the scope of work (see the minutes of this meeting in bundle ABD2 at pp 249–252).

[99] The first defendant informed the plaintiff about the reduced scope of work on 29 January 1999. Upon being notified about the change in the scope of works, the plaintiff submitted variation orders to the first defendant for Gunung Rapat (Santong), Jementah, Sg Perangin (Proton City) and PUB Bulk substations. For Rengit substation, the plaintiff did not submit anything because the actual scope of reduction for Tanjung Karang was not confirmed. The plaintiff's variation orders are in reality quotes of the prices for undertaking the revised scope of works. The plaintiff had to submit them because the site requirements have changed. For example, the land area in Santong is much larger compared to Gunung Rapat. As a result, the plaintiff has to purchase more copper, control cable, power cable and cable ladders. The requirement for the protection relay in the substation changed (ie, different type of protection relays from the tendered type). The reduction in scope also means fewer items to be procured from the plaintiff's supplier. This will result in a higher unit price. The plaintiff had to pay its suppliers a higher price to accelerate the delivery for last minute changes as demonstrated in PUB substation. The distance also contributed to the costs. Gunung Rapat is located in Ipoh, Perak but Santong is located in Terengganu. The first defendant's delay in payments also caused the plaintiff's suppliers to add interest charges for their new delivery to recover their losses.

(8) *The first defendant delayed approval of drawings*

[100] PW1 testified that there were consistent delays in approval of drawings by the first defendant. This in turn prevented the suppliers from manufacturing the equipments for the respective stations. DW3 during cross-examination agreed that there was an extremely long delay in approving the drawings that were submitted by the plaintiff. Delay in obtaining TNB's approval is the first defendant's fault because obtaining TNB's approval was the first defendant's responsibility. Delay in approving drawings affect speed of manufacturing and overall performance of the subcontract.

[101] I am of the view the first defendant's delay in approving drawings is a breach of the subcontract as it amounted to the first defendant's failing in its duty to render cooperation and duty of non-prevention.

(9) *The first defendant's failure to provide information*

[102] There was a lack of information from the first defendant on the requirements of the substations. The first defendant delayed in providing technical information which in turn caused delays in drawings, design and delivery of equipment. There was no scheduled progress meeting for the contract. Information from the first defendant seldom comes on time and there were very few correspondences from the first defendant for this contract which show how little information the first defendant had passed on to the plaintiff. This failure of the first defendant is another example of the first defendant's breach of the duty to cooperate and duty of non-prevention.

(10) *Additional last minute requirements by the first defendant*

[103] It is noted that from time to time there were last minute additional requirements imposed by TNB and/or first defendant to the plaintiff concerning the design of the substations. Each time where there was an additional requirement, the plaintiff had to go back to the suppliers to incorporate the additional requirement. This made it impossible for the plaintiff to commit to a definite delivery time.

(11) *The first defendant delayed confirmation of technical documents and current transformers calculations*

[104] DW3 in his evidence-in-chief agreed that calculation for Current Transformers ('CT') must have TNB's approval. But the first defendant delayed in confirming CT calculations which caused delayed procurement and confirmation of orders with suppliers. DW3 also confirmed during cross-examination that there was a delay in the approval of CT calculation. Without CT calculation suppliers cannot proceed to manufacturing.

(12) *The first defendant failed to grant extension of time*

[105] By a letter dated 3 February 2000 the plaintiff applied to the first defendant for an extension of time to complete the subcontract. The plaintiff cited amongst others the following grounds for extension of time:

(i) variations orders issued on the Santong, PUB (Bulk), Jementah and Proton City substations that involved a reduction in the scope of supply;

(ii) relocation of equipments;

(iii) delay in the flow of information that caused significant consequential delays on design works that caused delay in delivery;

(iv) type of power transformer used at all substations has not been officially confirmed which affected delivery; and

(v) non-confirmation of CSD requirement for Tanjung Karang substation; the particular 11KV feeders that will be reduced; TNB's approval for MV switchgear drawings.

[106] The first defendant did not respond to the plaintiff's said application. I am of the view based on the numerous breaches of the subcontract and the first defendant's act of prevention as hereinbefore stated, the first defendant is not entitled to hold the plaintiff to the original completion date and penalise the plaintiff with liquidated damages. It is wrong for the first defendant not to give extension of time. In *Dodd v Churton* [1897] 1 QB 562, Lord Esher MR stated the common law position on this issue as follows:

> The principle is ... that, when one party to a contract is prevented from performing it by the act of the other, he is not liable in law for that default; and accordingly a well established rule has been established in cases of this kind... to the effect that if the building owner has ordered extra work beyond that specified by the original contact which has necessarily increased the time requisite for finishing the work, he is thereby disentitled to claim the penalties for non-completion provided for by the contract. The reason for that is that otherwise a most unreasonable burden would be imposed on the contractor.

[107] This was a decision that involved a contract that does not have an express provision for extension of time as with the subcontract in the present case. It does however has a provision for liquidated damages to be imposed for delay in completion. Despite that the court ruled that the employer cannot invoke the liquidated damages provision and time was at large.

[108] The principle laid down in the case of *Dodd v Churton* was applied by the Malaysian Federal Court in *Sim Chio Huat v Wong Ted Fui* [1983] 1 MLJ 151; [1983] 1 CLJ 178 in which the Federal Court ruled, inter alia, that where there is no provision for extension of time for completion, any acts of the employer preventing completion invalidate any clause for liquidated damages as by such acts '*the time became at large*'and there is no date from which damages could run.

(13) *The first defendant unilaterally and wrongfully took over the substations*

[109] Between 18 August 2000 and 22 August 2000, the first defendant unilaterally issued notice of taking over for Sri Gading, Jelapang, Kulim, Behrang, Hutan Melintang and PUB (Bulk). On 6 September 2000 the first defendant issued confirmation of taking over to the plaintiff for PUB (Bulk).

The first defendant cited the following reasons for taking over the substations mentioned:

(i) for Sri Gading, the reason was the plaintiff's purported failure and/or refusal to deliver the MV Switchgears and accessory items;

(ii) for Jelapang, Kulim and Behrang, the reason was the plaintiff's purported failure to respond to the first defendant's letter dated 5 June 2000;

(iii) for Hutang Melintang, the reason was the plaintiff's purported failure to deliver the steel structure and control relay panel; and

(iv) for PUB (Bulk), the reason was the plaintiff's purported failure to deliver the SAS to the substation.

[110] The plaintiff responded to the first defendant taking over the substations above mentioned by replying as follows:

(i) by letter dated 25 August 2000, the plaintiff stated that delivery dates could not be provided because of the non-approval of the variation orders for MV Switchgears which hindered the plaintiff from instructing suppliers to proceed with manufacturing. The first defendant had also failed to confirm the scope of reduction for Tanjung Karang. Delay in delivery of switchgears only occurred in June 2000 when the first defendant had already breached the subcontract by diverting TNB's payments in January 2000. Due to the failure by the first defendant to address the issues mentioned in the said letter, the first defendant had no right to question the plaintiff's performance;

(ii) by letter dated 25 August 2000, the plaintiff set out a list of issues that the first defendant failed to decide and instruct in respect of the Jelapang substation. The plaintiff also mentioned the first defendant's failure to pay the plaintiff's invoices. For these reasons, the plaintiff informed that it is not obligated to continue with the subcontract. The plaintiff gave similar responses in respect of the Kulim, Behrang and Hutan Melintang substations. In respect of Hutan Melintang, the plaintiff further submits that the delivery of the steel structure was delayed because of delay in paying the suppliers which in turn was caused by TNB's delay in paying the plaintiff's invoice. In any event, the steel structures concerned were supplied and delivered. The plaintiff also responded through its letter dated 30 August 2000 for Batu Pahat which is in bundle ABD3 at p 626; and

(iii) in respect of the PUB (Bulk) substation, DW3 during cross-examination agreed that this issue of non-delivery of SCS only arose in June 2000. In this regard, the plaintiff responded through its letter dated 7 September 2000 and its solicitor's letter dated 29 October

2001. The plaintiff emphasised that the equipments for this substation were delivered and a taking over certificate was in fact issued. DW3 confirmed during cross-examination that all equipments for this substation were indeed delivered.

[111] I am of the view that the first defendant itself is in breach of the subcontract. The first defendant's indecision, inability to confirm status of substation, failure to consider the plaintiff's variation order, delays in site availability, changes to scope of work, deferment and then cancellation of substations and more importantly, continuous refusal to pay the plaintiff's invoices demonstrated a clear intention of not honouring the subcontract. Under such circumstances, where the fundamental payment terms of the contract have been undermined, the plaintiff was entitled to treat that the first defendant had repudiated the subcontract and hence, the plaintiff is no longer bound to continue with the subcontract.

[112] It is my judgment that the first defendant had failed to demonstrate in what ways the plaintiff had breached the subcontract that could entitle the first defendant to take over. The subcontract does not provide for any right to the first defendant to take over 'some' of the substations. The first defendant via DW3 tried to justify the taking over of substations without terminating the whole of the subcontract by reference to cl 12 of the TNB's general conditions of contract. I find this argument is baseless. Firstly, TNB's general conditions of contract are not binding on the plaintiff. Secondly, cl 12 of TNB's general conditions of contract requires that the first defendant to give notice to make good the failure, neglect or contravention complained of. It is only after a reasonable time if the plaintiff failed to rectify can the first defendant take over the works. The first defendant did not give any such notice. The first defendant launched straightaway to issue the notices of intention to take over. Even if the first defendant had any grounds to take over, which the plaintiff had vehemently denied, the first defendant's taking over was procedurally wrong rendering the entire exercise wrongful and unlawful. In short, the first defendant was not entitled to take over the substations.

[113] I shall now deal with the first defendant's defence on the rehabilitation programme as devised by TNB. It is to be noted that the first defendant's entire case is anchored on this rehabilitation programme. The first defendant contends the programme resulted in a variation of the contract which the first defendant is entitled to order and the cost impact on the plaintiff was minimal. On this point it is my view that the first defendant's contention is untenable on the following grounds.

[114] Firstly, there is no provision in the subcontract that give the first defendant a right to order variation of the subcontract. Without such a right, any changes to the subcontract have to be by mutual consent.

[115] Secondly, the first defendant wrongly claimed the right to order variation based on cl 10 of TNB's general conditions of contract. TNB's general conditions of contract are not binding on the plaintiff and hence, the right to order variation under cl 10 is only available to TNB as against the first defendant. The first defendant cannot justify a right to order variation on a contract that is not binding on the plaintiff.

[116] Thirdly, even if the first defendant can rely on cl 10 of TNB's general conditions of contract to order a variation, that clause only permits a variation of up to 15% of the contract value. But what the first defendant had done to the subcontract was to cancel 50.76% of the subcontract value. During cross-examination, DW3 agreed that the reduction in price is more than 15% of the contract value. Whereas DW2 during cross-examination admitted that works in respect of Proton City were reduced as much as 50%. When referred to the document in bundle ABD1 at p 91, DW2 confirmed that RM36,561,205.93 was the amount of the reduction resulting from the cancellation of the five substations. Clearly, the first defendant would on this score be acting in excess of what is permissible under cl 10 of TNB's general conditions of contract.

[117] Fourthly, even if a contractual right to order variation is available to the first defendant against the plaintiff, there is always a corresponding right to compensation for costs. But the first defendant wants the so-called variation for free. It ignored the plaintiff's requests for compensation for costs.

[118] Fifthly, DWl himself agreed during cross-examination that if new site is involved, it is an entirely new substation. How could it then be a variation of the subcontract when a substantial part of it is affected.

[119] Sixthly, the cost impact on the plaintiff was not as minimal as the first defendant contends. There were substantial costs wasted and also incurred to carry out what was contemplated by the rehabilitation programme. Even DWl agreed during cross-examination that everything has to be started all over again, meaning that the entire process of getting approval of drawings to determining location and obtaining of way leave permission to the substation.

[120] Lastly, it is important to note that the plaintiff had never raised its prices for the original contract scope. It merely submitted its revised price for

the relocated substations. DW2 admitted to this during cross-examination when he said '*Saya setuju bahawa plaintif hanya memberi angka-angka baru bagi substation yang dipindahkan untuk dipertimbangkan*'. Hence, any suggestion that the plaintiff used the opportunity arising from the relocation to coerce the first defendant by raising all the original agreed price is simply not true.

Consequences of the first defendant's repudiation

[121] It is my finding that the first defendant had repudiated the subcontract by the various repudiatory acts that have hereinbefore been documented and explained. With the first defendant's repudiation, the plaintiff is therefore discharged from further performance of the subcontract. In *Ban Hong Joo Mines Ltd v Chen & Yap Ltd* [1969] 2 MLJ 83, the Federal Court, inter alia, held that the deliberate refusal of the appellants to pay for what was already done by way of fortnightly payments and their order to the respondents to stop work left the respondents with no option but to treat the contract as having been repudiated and to sue for work which they had already done.

[122] The first defendant's repudiation of the subcontract presented the plaintiff with only one option, either to affirm the subcontract or to accept the repudiation and treat it as at an end and hence, releasing the plaintiff from further performance of the subcontract. This is an option recognised by s 40 of the Contracts Act 1950. The plaintiff had chosen the latter and accepted the first defendant's repudiation.

[123] I would also like to state here that the plaintiff is entitled to retention money as claimed. In each invoice issued by the plaintiff to the first defendant, 10% is held back as retention.

[124] The first defendant is supposed to pay the plaintiff the retention money when the taking over certificate and the final certificate is issued. But since the first defendant has repudiated the subcontract, I am of the view the plaintiff is entitled to be paid all retention money withheld. The serious action of the first defendant's act of diverting a very substantial amount of the plaintiff's money, cancellation of the substations in Mainheads D and F, refusing to pay the plaintiff for equipment delivered, the late payments, taking over the substations without good reason through their notice of taking over and expecting the plaintiff to continue with the reduced scope of the contract at the original contract rates, all point to the conclusion that the first defendant does not intend to honour its obligations in the subcontract. With these actions, the first defendant has destroyed all trust and confidence that the plaintiff had in it. These actions also made it very difficult for the

plaintiff to continue with the subcontract. By these acts, the first defendant has repudiated the contract, which repudiation the plaintiff has accepted by the plaintiff's letter of 7 September 2000. With the termination of the contract, there is no longer any subsisting contractual relationship and therefore there is no basis for the first defendant to hold on to the retention monies.

[125] Retention money is usually a sum of money set aside and held by the employer until all defects have been satisfactorily rectified, (see Chow Kok Fong, *Law and Practice of Construction Contracts*, (3rd Ed), at p 3441. But retention money is the contractor's money. It is held on trust by the employer usually until defects liability period had ended. According to Peh Swee Chin J (as he then was) in *Lee Kam Chun v Syarikat Kukuh Maju Sdn Bhd (Syarikat Perumahan Pegawai Kerajaan Sdn Bhd Garnishee)* [1988] 1 MLJ 444, retention sum is an existing debt and one cannot lose sight of the fact also that the retention sum was deducted from value of work already and actually done and materials already and actually supplied.

[126] Retention money is held on the basis that the contract is on foot. If the contract in question has been repudiated, both parties are discharge from further performance of the contract and the retention money held which is trust money has to be paid back to its rightful owner. In this regard, that would be the plaintiff.

[127] When the plaintiff began this action, the retention monies claimed against the first defendant is RM405,826.30 and USD952,917.95. This is the retention for the substations listed in para 24A of the amended statement of claim.

THE FIRST DEFENDANT'S COUNTERCLAIM

[128] It is my finding that the first defendant has not provided any evidence whatsoever to prove its counterclaim. The counterclaim is misconceived and baseless in any event. Having found that the plaintiff has proven its claim and that the first defendant was the party who had breached the subcontract, the first defendant's counterclaim must be rejected. The other reasons for rejecting the counterclaim are as set out below:

Counterclaim No 1

[129] In the first counterclaim, the first defendant claims that it had been exposed to LAD at the rate of 1% of the contract value of such delayed portion for each week's delay (see para 38.1 and 38.2 of defence and counterclaim). This is in fact and substance a claim for damages for losses

purportedly suffered, the losses being in the form of LAD being imposed on the first defendant by TNB. It is my considered view that firstly, there is no proof that TNB imposed LAD on the first defendant for any of the substation. Even if TNB did impose LAD on the first defendant, there was no proof that this was directly caused by the plaintiff's breach of the subcontract. Amongst all three witnesses of the first defendant, only DW2 had testified about LAD in his evidence-in-chief. Even then, all that he said was that the contract between the first defendant and TNB contains a provision for imposing LAD. During cross-examination however, DW3 had in fact admitted that there is no proof of any LAD imposed by TNB on the first defendant.

[130] Secondly, the first defendant must prove its damages but it failed to do so. In *Ban Chuan Trading Co Sdn Bhd v Ng Bak Chuan* [2004] 1 MLJ 411 the Court of Appeal quoted with approval a passage from *Bonham-Carter v Hyde Park Hotel* (1948) 64 TLR 177 which reads:

> The plaintiffs must understand that if they bring action for damages it is for them to prove their damages; it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying: 'This is what I have lost, I ask you to give me these damages.' They have to prove it.

[131] In this case, the fact of loss, that is, the imposition of the LAD by TNB has not been proven. It could not possibly be proven when there was no evidence tendered to prove it. Therefore, the first defendant has failed to prove its losses and is not entitled to any damages.

Counterclaim No 2

[132] The second counterclaim is that the first defendant's RM7,066,509.80 Bank Guarantee to TNB is 'jeopardised arising from the intimation of the second defendant for the imposition of liquidated and ascertained damages'. The fallacy of this counterclaim is clear. Firstly, if there was no LAD imposed, there could not be any possibility of the Bank Guarantee being called by TNB. Secondly, there was no evidence that the said Bank Guarantee was called by TNB. DW2 when under cross-examination could only testify that he was not sure whether the bank guarantee was called. Again the fact of actual loss has not been proven. Just as with the first counterclaim, it is my finding that the first defendant is also not entitled to any damages under the second counterclaim.

Counterclaim No 3

[133] This counterclaim is for alleged increased costs and expenses

expected to be incurred arising from the procuring of same equipment from alternative suppliers. The estimated amount is set out in para 38.5 of the defence and counterclaim. On this point I am of the view that this counterclaim must be rejected simply because these are merely conjectural losses that have not been incurred. The first defendant also has not provided any evidence at all to show that any such costs or expenses have been incurred. As earlier stated the actual loss must be proven if the first defendant is to recover damages. In this case, the fact of actual loss has not been proven and therefore on this ground alone, this counterclaim fails.

CONCLUSION

[134] Having studied the oral and documentary evidence tendered by the plaintiff and the first defendant, it is my finding that the plaintiff has on the balance of probabilities proven its case against the first defendant. I therefore allow the plaintiff's claim and make an order in terms of the claims as prayed for by the plaintiff in its amended statement of claim. The losses and damages if any arising from matters pleaded in paras 12.1, 12.2, 12.3, 12.4 and 12.5 of the amended statement of claim are to be assessed before the senior assistant registrar of this court. Having allowed the plaintiff's claim it is my finding that the first defendant had failed on a balance of probabilities to prove its counterclaim against the plaintiff. I therefore dismissed with costs the first defendant's counterclaim against the plaintiff.

Plaintiff's claim allowed and defendants' counterclaim dismissed with costs.

Reported by Ashgar Ali Ali Mohamed